Supreme Court, U.S.
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No. 00-419

In The

Supreme Court of the United States

DONALD BOYANOWSKI and
DOROTHY BOYANOWSKI,

Petitioners,

v.

CAPITAL AREA INTERMEDIATE UNIT,
JOHN E. NAGLE and ED FRYE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Does either the extent to which the Court of Appeals examined the trial record, or whether it reviewed the grant of a motion in limine, constitute an issue meriting further review in the Supreme Court, where the judgment below was based on the insufficiency of the underlying claims as a matter of law, and did not rest upon a basis to which such factors could be relevant?

– (Negative answer sought by Respondents)

II. Does the Petition offer any justification for revisiting the Supreme Court's teaching in *Siegert v. Gilley* that mere defamation by government actors presents no federal constitutional claim?

– (Negative answer sought by Respondents)

III. Was any aspect of the Court of Appeals' conclusion that the state law civil conspiracy verdict must be set aside as a matter of state law, or its determination and application of a state law doctrine plain from both state appellate decisions and sound legal reasoning, present an issue appropriate for grant of certiorari?

– Negative answer sought by Respondents)

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COUNTER-STATEMENT OF THE CASE

The Petition's descriptions of procedural history and facts in this case are so replete with inaccuracies or assertions having sparse relation to the record, and so intertwined with argumentative charges masquerading as fact but as to which no competent evidence has been offered, as to defy any attempt at concise point-by-point discussion. To the extent inconsistent with the procedural background and facts set forth below, the Petition's statement of the case should be regarded with great caution.

Procedural Background

In August 1984, Petitioners Donald Boyanowski and Dorothy Boyanowski (appellees/plaintiffs below), along with Boyo Transportation Services, Inc. ("Boyo"), filed a complaint in the U.S. District Court for the Middle District of Pennsylvania at docket number 1:CV-94-1252, alleging various claims against Respondents (appellants/defendants below) Capital Area Intermediate Unit ("CAIU"), Dr. John E. Nagle ("Nagle"), and Edward T. Frye ("Frye"). Complaint, A. 12-29. Nagle was the CAIU Executive Director prior to his retirement in July 1993, and Frye was the CAIU Assistant Executive Director until he succeeded Nagle as Executive Director in July 1993. Frye, NT A224-25, 522; Nagle, NT A449.[1]

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[1] Except where specified otherwise, all references herein to the appendix (*e.g.*, "A449") are to the appendix filed by Respondents in the court below, rather than to the supplementary appendix filed below by Petitioners.

Relevant to the appeal below are claims asserted in that complaint by Donald Boyanowski, Boyo, and Dorothy Boyanowski that during the late winter, spring and summer of 1993, CAIU, Nagle and Frye violated their federal substantive due process rights and conspired to do so, for which they claimed relief pursuant to 42 U.S.C. § 1983. They also claimed, pursuant to state law, that the same conduct of CAIU, Nagle and Frye tortiously interfered with their contractual interests, and amounted to a civil conspiracy to do so.

Prior to trial, the action in which the Boyanowskis and Boyo brought the claims described above was consolidated with two other actions, one by Donald Boyanowski and Boyo alleging similar claims against Marc Bauer and West Perry School District (originally docketed in the district court at no. 1:CV-96-404), and another in which Michael Labalokie brought First Amendment retaliation claims and state law tortious interference with contract claims against CAIU, Nagle and Frye (originally docketed in the district court at no. 1:CV-95-838). Docket entries, A4-5. Marc Bauer was the CAIU's supervisor of special education until he became the CAIU assistant executive director during the summer of 1993, succeeding Frye. Bauer, NT A603. In May 1997 the Court granted summary judgment in favor of West Perry School District and Bauer.

Trial of this action took place before a jury commencing on June 23, 1997 through July 1, 1997. As a result of other rulings on defense motions during and prior to trial, the only claims submitted to the jury consisted of Labalokie's First Amendment retaliation claim against defendants CAIU and Nagle only, Labalokie's tortious

interference with contract claim against Nagle only, the substantive due process claims (including conspiracy claims) of Donald Boyanowski and Boyo, Inc. against CAIU, Nagle and Frye, and Dorothy Boyanowski's tortious interference with contract and civil conspiracy claims against Nagle and Frye only. Docket entries, A6; Pretrial conference order, A70; July 16, 1997 order, docket entries, A9; jury charge, A88-118. As submitted to the jury, only Boyo could recover damages for economic loss due to lost business prospects, since that was the entity with whom any school districts would have contracted and through which Donald Boyanowski intended to do business. The court ruled that Donald Boyanowski himself could not recover such damages. *Id.*; verdict form, A119-20, A123.

The jury returned a mixed verdict, finding for the defendants on the claims of Labalokie and Boyo, Inc., on the tortious interference with contract claim of Dorothy Boyanowski, and on the conspiracy aspect of Donald Boyanowski's substantive due process claim. The jury also found in favor of Frye on Donald Boyanowski's substantive due process claim. The jury found CAIU and Nagle liable on Donald Boyanowski's substantive due process claim, awarding compensatory damages for emotional harm only in the amount of $50,000 against CAIU and $100,000 against Nagle, and also awarding punitive damages in the amount of $100,000 against Nagle. The jury found Nagle and Frye each liable on Dorothy Boyanowski's civil conspiracy claim, awarding $100,000 in compensatory damages against Frye and $50,000 in compensatory damages against Nagle. The jury declined to

award punitive damages against Nagle or Frye on Dorothy Boyanowski's civil conspiracy claim. NT A119-130, A689-94.

CAIU, Nagle and Fry filed post-trial motions, renewing their motions for judgment as a matter of law, and alternatively seeking a new trial. On April 27, 1998, the district court granted the motion for judgment in part, ruling that Nagle was entitled to qualified immunity on Donald Boyanowski's substantive due process claim, and setting aside the jury's awards in favor of Donald Boyanowski and against Nagle for $100,000 in compensatory damages and $100,000 in punitive damages. The district court denied the post-trial motions in all other respects, entering judgment on the remaining claims in accordance with the verdicts.

On May 27, 1998, CAIU, Nagle and Frye filed a notice of appeal from the Amended Judgments entered April 27, 1998, and from the district court's order of the same date insofar as it denied their motions for judgment as a matter of law and new trial, as well as from the amended judgments entered on July 7, 1997, prior to the filing of post-trial motions.

On June 9, 1998, Petitioners filed a notice of appeal initiating their cross-appeal, followed by an amended notice of appeal filed on June 10, 1998. These notices of the cross-appeal appeared to encompass numerous District Court rulings adverse to each of the various plaintiff parties below, including pre-trial, trial and post-trial rulings. However, Petitioners' sole brief in support of a cross-appeal was filed only on behalf of Petitioner Donald E. Boyanowski, which was expressly limited in its

scope to only that portion of the District Court's April 27, 1998 ruling on Respondents' (cross appellees below) post-trial motions according Respondent Nagle qualified immunity and entering judgment in Nagle's favor on that basis. Brief of Cross Appellants, at 2. Petitioners' brief in support of the cross-appeal did not address any pre-trial or trial rulings pertaining to Donald Boyanowski, nor any rulings or trial results below relating to claims of Dorothy A. Boyanowski, Boyo Transportation Systems, Inc., or Michael Labalokie. Petitioners filed no other brief in support of a cross-appeal relating to those issues.

During a telephone conversation on May 10, 1999, counsel for Petitioners stated to Respondents' counsel that the limited scope of the brief for cross appellants reflected an intent that Donald Boyanowski and John Nagle be the only remaining parties to the cross-appeal, with the only remaining issue that of the trial court's April 27, 1998 ruling according Nagle qualified immunity, and that it was intended to forego pursuit of all other cross-appeal issues identified in the notices of appeal on behalf of Donald Boyanowski and other plaintiff parties identified in the captions below. Accordingly, although named in the caption as cross appellants, Petitioners' counsel explained that Dorothy A. Boyanowski, Boyo Transportation Services, Inc. and Michael P. Labalokie were no longer pursuing cross-appeals before the Court of Appeals, and nor was any plaintiff party below further pursuing cross-appeals against the Capital Area Intermediate Unit, Edward T. Frye, Marc A. Bauer, Roger Morrison or the West Perry School District.

On or about May 4, 1999, counsel for cross appellants filed a motion and stipulation dismissing the cross-

appeals as against West Perry School District and Roger Morrison, which the Court of Appeals approved by order dated July 26, 1999. To date however, no similar motion and stipulation has been filed pertaining to the cross-appeals of Dorothy Boyanowski and Michael Labalokie.

At oral argument before the Court of Appeals on September 23, 1999, it was observed by the court that the briefs of Petitioners contained no citations to specific places in the record contradicting Respondents' arguments (*inter alia*) that the record was devoid of evidence which could establish concerted action or other essential elements of Petitioner Dorothy Boyanowski's state law civil conspiracy claim or which could defeat the Respondents' defenses relating to statutory immunity and the incapacity of corporate officers to conspire with one another. *See*, Brief for Appellants, pp. 12-14, 29-34; Brief for Cross-Appellees (CAIU, Nagle, Frye and Bauer)/ Reply Brief for Appellants, pp. 12-14, 28-30.

During argument, when the court asked Petitioners' counsel whether he could provide such citations to specific places in the record, counsel answered to the effect that he was not able to do so at that time. Accordingly, the court directed from the bench at argument that Petitioners' counsel file and serve a memorandum setting forth specific citations to the pages of the record containing favorable evidence on such issues.

Subsequently, on or about October 4, 1999, Petitioners filed with the Court of Appeals a document styled "Appellees' Memorandum As Per The Court's Bench Order Of September 23, 1999". After obtaining leave of

the court, Respondents then filed a responsive memorandum dated October 15, 1999, pointing out, among other things, that every one of the 20 pages of the record to which Petitioners' post-argument memorandum made specific reference were included in the appendices submitted to the Court of Appeals along with the parties' briefs.

On June 14, 2000, the Court of Appeals reversed the District Court and directed that judgment be entered in favor of defendants (Respondents) on all counts. *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 407 (3d Cir. 2000).

Facts

Intermediate units are regional governmental entities created by Pennsylvania statute as part of the state system of public education which operate various programs of special education and other services in which local public school districts assigned to each IU are entitled to participate. Intermediate units are governed by a board of directors elected from among the boards of directors of the component school districts, a chief executive officer known as the executive director, and an executive council, chaired by the executive director, comprised of the superintendents of each component school district. CAIU is one of 29 intermediate units in Pennsylvania. Pa. Stat. Ann. tit. 24 § 9-901, *et seq.* (West 1992); Nagle, NT A453-55, A478-82.

Among numerous other consortium-type programs operated by intermediate units, CAIU operated a network providing transportation of disabled children to and from various special classes and programs at locations scattered throughout CAIU's region. CAIU provided this transportation through a combination of its own employees driving CAIU-owned equipment, reenforced by numerous independent contractors, retained under one-year contracts, operating their own vehicles. Zimmerman, NT A135-36; Rose, NT A558-93.

Donald Boyanowski had been, until his retirement in March 1993, CAIU's Transportation Supervisor for more than twenty years. Upon his retirement, Boyanowski established Boyo Transportation Services, Inc. ("Boyo"), through which he endeavored to directly contract with CAIU member school districts to provide the special education pupil transportation services that those school districts had for many years been receiving from the CAIU transportation network operated under Boyanowski's supervision. Despite his efforts, Boyanowski was unsuccessful in persuading any CAIU school districts to accept Boyo's contract proposals. Don Boyanowski, NT A259-85, A306-313; Dorothy Boyanowski, NT A249; Temple, NT A177-91; Labalokie, NT A243; Holtzman, NT A550-56.

Boyo and Boyanowski claimed that Boyo's lack of success was the result of a conspiracy engaged in by CAIU, Nagle and Frye to violate their federal constitutional rights by unlawfully interfering with his business efforts and preventing him from establishing his new business, essentially by smearing his personal and business reputation. At trial, the evidence presented in support of these claims amounted to little more than

disputed testimony to the effect that Defendant Nagle had unfairly blamed Boyanowski for the skyrocketing costs of the CAIU transportation program he had supervised, and had once referred to him as a "crook" in course of a discussion with the CAIU Superintendents Council. There was no evidence that Nagle ever made any such disparaging remarks other than to the Superintendents Council or to the CAIU Board of Directors, or that he did anything other than respond or react to questions from those governing bodies about Boyanowski and the CAIU transportation program. There was no evidence that anything CAIU or its officials did was causally related to any school district's decisions regarding whether Boyo would be retained to provide transportation services. Gutshall, NT A205-19; Lytle, NT A165-67, A174-75; Labalokie, NT A230-34; Walters NT A222; Zimmerman, NT A137-39, A153; Don Boyanowski, NT A286-88, A320-36; Nagle, NT 349-54; Holtzman, NT A550-56; Temple, NT A177-91.

The defense evidence disputed that Nagle had ever called Boyanowski a crook or that Nagle or Frye otherwise accused him of wrongdoing or attempted to interfere with his business efforts. The defense presented evidence that Boyanowski's retirement came as a surprise, in the middle of budget preparation and attempts to resolve questions raised by CAIU school districts about the reasons for rapidly increasing costs of participating in the CAIU transportation program. The CAIU officials claimed that they were only attempting to continue that inquiry in the wake of Boyanowski's unexpected retirement, reporting what they were learning to the CAIU board of directors and executive council, and attempting

to answer additional questions from school district representatives prompted by Boyanowski's sudden emergence as an aspiring competitor. Don Boyanowski, NT A263-72; Rose, NT A557-71; Zimmerman, NT A159-62; Spitler, NT A432-44; Gutshall, NT A216-18; Holtzman, NT A550-56; Nagle, NT A349-75, A450, A456-70, A501-08; Executive Council minutes, CAIU Ex. C-43, A713-33.

CAIU contended that along the way, while considering proposals to contract out all aspects of the program operation in order to reduce costs, the new CAIU transportation supervisor Deanna Rose and special education supervisor Marc Bauer developed a plan for continuing the CAIU program at what they believed would be significantly greater cost efficiency. This was to be achieved mainly by redesigning bus routes and passenger assignments to reduce the number of empty seats, enabling them to reduce the number of contracted vehicles and runs, and to qualify a greater portion of the remaining runs for state reimbursement. After surveying its component school districts, the CAIU board decided to try operating the program for at least one more year under Rose and Bauer's plan, rather than dismantling the program, staff and equipment. All but one school district elected to continue participating in the program for the following year, 1993-94, rather than entering into separate contracts on their own. Nagle, NT A356-58, A457-70, A 478-500; Frye, NT A545, A525-28; Rose, NT A557-85; Bauer, NT A605-11, A623-32.

Plaintiff Dorothy Boyanowski also claimed that her substantive due process rights were violated when she did not receive a new contract for the 1993-94 school year,

and later when CAIU allegedly prohibited another contractor from hiring her as a driver. She further claimed that these events also constituted a tortious interference with contract, and were the subject of a civil conspiracy on the part of Nagle and Frye to tortiously interfere with her contractual interests. With regard to defendant Nagle, the evidence presented in support of these claims at trial showed only that at the close of the 1992-93 school year, in response to a letter from Labalokie, Nagle sent Labalokie and Dorothy Boyanowski virtually identical letters informing them that their services were not needed for the next school year due to downsizing and elimination of runs, which he did only upon being informed by acting CAIU transportation supervisor Deanna Rose that there were no contracted transportation runs available for assignment to them as result of the restructuring and the termination of one school district's participation. There was no evidence that Nagle had any reason to disbelieve what Rose had told him, or of any intention on his part to harm Dorothy Boyanowski. There was no evidence that Defendant Frye had any involvement in this exchange, or that he ever discussed it with Nagle. Labalokie, NT A238-42; Dorothy Boyanowski, NT A250-53; Rose, NT A581-87, A592-600; Nagle, NT A359-67, A506-07; Frye, NT A530-32, A538-39, A545.

With regard to Defendant Frye, the only evidence at trial underpinning Dorothy Boyanowski's remaining claims was to the effect that in late Summer 1993, after Nagle was on terminal vacation leave prior to retirement, Frye was approached by Deanna Rose and informed that another contractor had asked "how CAIU would feel" about that contractor hiring Dorothy Boyanowski as a

driver. Frye responded to Rose that he didn't think it was a good idea at that time, which Rose then communicated to the contractor. The contractor then declined to hire Dorothy Boyanowski. There was no evidence that Frye did anything other than respond to an inquiry, or that he directed the contractor to refrain from hiring Boyanowski. There was no evidence that Nagle had any involvement in this matter or ever discussed it with Frye. There was also no evidence that Nagle and Frye otherwise had any shared ill will toward Dorothy Boyanowski, that they ever had any shared plan or intentions toward her of any kind, or that she was ever a topic of discussion between Nagle and Frye. Winters, NT A195-99; Frye, NT A226-29, A532-34; Rose, NT A601-2; Nagle, NT A363-67; Spitler, NT A434; Morrison, NT A519-521.

REASONS FOR DENYING THE WRIT

In addition to numerous other departures from what the rules of the Supreme Court require of petitions for certiorari, the Petition here utterly fails to set forth any compelling reason consistent with Supreme Court Rule 10 suggesting that some aspect of the decision of the Court of Appeals might merit the attention of this Court. Sup. Ct. R. 10. Not only is the opinion of the Court of Appeals soundly reasoned, faithful to the teachings of the Supreme Court in analogous cases, and solidly grounded in the record, the Petition makes no attempt whatsoever to point to any decision of another federal court of appeal or state court of last resort with which the underpinnings of the ruling below, or their application in this case, might be characterized as being inconsistent.

I. NEITHER THE EXTENT TO WHICH THE COURT OF APPEALS EXAMINED THE TRIAL RECORD NOR WHETHER IT REVIEWED THE GRANT OF A MOTION IN LIMINE CAN CONSTITUTE AN ISSUE MERITING FURTHER REVIEW IN THE SUPREME COURT, IN THAT THE JUDGMENT BELOW WAS BASED ON THE INSUFFICIENCY OF THE UNDERLYING CLAIMS AS A MATTER OF LAW, AND DID NOT REST UPON A BASIS TO WHICH SUCH FACTORS COULD BE RELEVANT

The Petition contends that two evidentiary issues should be regarded as particularly significant with respect to whether certiorari should be granted in this case. Petition at 2, 12. The first contention, beginning with Petitioners' incorrect description of the Court of Appeals' judgment as "fact-based", asserts in essence that the court on appeal must always review the entire trial record before ruling on the sufficiency of evidence to support a disputed claim. Petition at 2, 7-8. The second contention focuses on the omission, in the opinion of the court below, of any discussion of the argument now made by Petitioners that the trial court erred in granting a defense motion *in limine* seeking to bar testimony of the CAIU Supervisor of Data Processing, William Jacobi, due to his *ex parte* dealings with Petitioners' counsel during the course of litigation.

Initially, it should be noted that the latter contention, which Petitioners now describe as perhaps "the most important addressed to this Court", Petition at 12, should be regarded as having been abandoned on appeal. As with other matters initially encompassed in Petitioners' amended notice of appeal and later abandoned, the issue

of the motion *in limine* regarding Mr. Jacobi, while mentioned to some degree in Petitioners' brief in opposition to *Respondents'* appeal in the court below, was neither set forth as a question presented nor discussed in Petitioners' brief in support of their cross-appeal.

Most significant to both of these fact-oriented issues is that the Court of Appeals did not reverse the judgment of the trial court in this case based on sufficiency of evidence, either on the federal substantive due process claim asserted by Mr. Boyanowski or on the state-law civil conspiracy claim asserted by Mrs. Boyanowski. It did not need to. Instead, the Court of Appeals set aside the trial verdict and entered judgment for the Respondents because it found each of those claims insufficient as a matter of law. 215 F.3d 396, 401, 405, Slip Op. at 9, 16. This made it unnecessary for the Court of Appeals to address any of the various evidentiary arguments presented by either Petitioners or Respondents on appeal below, upon which the Court of Appeals expressly declined to rule. These issues would, of course, remain to be decided if the Court of Appeals judgment were to be altered in some way by the Supreme Court.

For the same reason, the judgment sought to be appealed from does not present, in a context meriting the attention of the Supreme Court, the issue asserted by Petitioners with regard to the trial court's grant of the motion *in limine*. In addition, at no stage have Petitioners proffered a theory of how the exclusion of the testimony concerned might have altered the result at trial, given that the jury verdicts favored Petitioners on the claims considered by the Court of Appeals, which later set them aside on purely legal rather than factual grounds.

Moreover, Petitioners' assertions regarding what review of the record was either required of or actually conducted by the Court of Appeals are both groundless and speculative. The Federal Rules of Appellate Procedure and the Third Circuit Local Appellate Rules make it quite clear that it is the obligation of the parties to bring to an appellate court's attention any specific aspect of the record believed to be pertinent to the issues presented on appeal, that parties should not simply dump the entire record into the appendix on appeal, and that parties may not simply expect the court to search for needles in an undigested haystack of material. Fed. R. App. P. 10(b)(2) (parties contending on appeal that a finding or conclusion is unsupported must include in the record all "relevant" evidence); Fed. R. App. P. 28(a)(7),(9)(A),(b) (assertions of fact in briefs to include appropriate references to the record); 3rd Cir. LAR 28 (1997) (all assertions of fact in briefs shall be supported by a specific reference to the record); Fed. R. App. P. 30(a) (parts of the record may be relied on by the court or parties even though not included in the appendix); Fed. R. App. P. 30(b) (parties must refrain from unnecessary designation of parts of the record for the appendix, because entire record is available to the court); 3rd Cir. LAR 30.3 (whenever appeal challenges the sufficiency of evidence, appendix must reprint all evidence supportive of the challenged determination).

By stark contrast, neither the Petition nor the Petitioners' briefs below contain a single specific reference to the trial record from which it might be determined or even guessed what evidence Petitioners think the Court of Appeals should have examined, but failed to consider. Even if such references were supplied, it normally would

be pure speculation to assert that any particular part of the record in fact escaped the consideration of the court below. Here however, when the Court of Appeals gave Petitioners a final opportunity, *after argument*, to point to specific evidence of record upon which they wished to rely, every single item Petitioners found worthy of specific reference in their response already was contained in the appendices filed along with the parties' briefs and presumably examined by the Court of Appeals.

II. THE PETITION OFFERS NO JUSTIFICATION FOR REVISITING THE SUPREME COURT'S TEACHING IN *SIEGERT V. GILLEY* THAT MERE DEFAMATION BY GOVERNMENT ACTORS PRESENTS NO FEDERAL CONSTITUTIONAL CLAIM

The Supreme Court should refuse the Petition's invitation to deviate either from the Court's frequent admonition against allowing the Due Process Clause to become "a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul v. Davis*, 424 U.S. 693, 701 (1976); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 673 (1999), or the Court's repeated caution that any expansion of substantive due process theories must be viewed with extreme caution. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

Here, the Court of Appeals correctly recognized that to the extent there once was any question about whether garden variety defamation, even by government officials, could be the basis of a due process claim, substantive or procedural, that question had already been answered in

the negative by the Supreme Court in *Siegert v. Gilley*, 500 U.S. 226 (1991). In *Siegert*, presenting a claim quite similar to what the trial court permitted to go the jury in this case, the plaintiff attempted to plead a "stigma plus" constitutional injury based on a highly derogatory letter written by the plaintiff's former supervisor at the federal government hospital from which he had resigned several weeks prior.

Because the plaintiff had voluntarily resigned prior to the alleged defamation, the Court held that the injury to the plaintiff's reputation and future employment prospects, in fact later causing denial of other government employment, was no different than the kind of loss which usually flows from injury to reputation, and was therefore insufficient to provide the "plus" required to establish an actionable constitutional deprivation. 500 U.S. at 233-234. The Court held that so long as the harm in question flows only from the reputational injury, it may be actionable under state tort law but not in a federal due process claim, even where there are allegations of malice on the part of the defendants. *Id.*

As aptly noted by the Court of Appeals, the Petitioners' brief below dispels any doubt about whether it is fair to describe the theory of harm in this case as an impermissible attempt, for the purpose of circumventing state government immunity laws, to assign constitutional dimension to what was nothing more in relevant aspects than any other state law defamation or business disparagement claim. The following passage from Petitioners' brief in the court below is quoted in the Court of Appeals' opinion:

> According to appellants, if a government entity is interested in doing business, and in the process uses its political power and muscle to systematically destroy the business opportunities of a competing private citizen *through slur, innuendo, and outright false accusations*, then the misconduct is simply not actionable. In Pennsylvania sovereign immunity protects government from tortious interference with contracts suits. Appellants know there is no adequate recourse under state defamation law also because of sovereign immunity statutes.

Appellee's Br. at 8 (emphasis added); *quoted at* 215 F.3d 400. This Court made it quite plain in *Siegert* that injury to reputation, including the business and professional harms that are likely to accompany damage to reputation, does not by itself implicate any liberty interest protected by the Fourteenth Amendment, even when the alleged defamers are government officials claimed to be acting with malice. *Siegert*, 500 U.S 233-34.

The Petition makes no attempt to point to any circuit or other case suggesting that *Siegert* should not have been applied as the Court of Appeals did in this case, nor to any decision raising question about the viability of this aspect of the Court's decision in *Siegert*.[2] Instead, the

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[2] To the extent that there has been any judicial uncertainty or disagreement about the application of *Siegert*, it appears to have been limited to the Court's guidance that before attempting to determine whether a constitutional right was clearly established for purposes of qualified immunity, logic and judicial economy dictate that the court first should determine whether the allegations involve a protected right in the first place, rather than assuming it for the purposes of

Petition simply offers what amounts to little more than a statement of unhappiness about this Court's steadfast refusal to view the Constitution as a font of tort and business practices law providing a right for every perceived wrong lacking a viable state-created remedy.

III. IN CONCLUDING THAT THE STATE LAW CIVIL CONSPIRACY VERDICT MUST BE SET ASIDE AS A MATTER OF STATE LAW, THE COURT OF APPEALS PROPERLY DETERMINED AND APPLIED A STATE LAW DOCTRINE MADE PLAIN BOTH BY STATE APPELLATE DECISIONS AND SOUND LEGAL REASONING

The Court of Appeals' decision that Dorothy Boyanowski's state-law civil conspiracy claim could not stand alone, in view of the jury's determination that the underlying tort had not occured, likewise presents no compelling reason meriting further review. The Petition fails to provide any explanation or authority for its bald assertion that the Court of Appeals' decision was "arbitrary and capricious", nor for the bare proposition that the longstanding principles summarized in *West v. American Telephone & Tel. Co.*, 311 U.S. 223 (1940), should be revisited or altered.

In determining and applying the pertinent governing rule of Pennsylvania law in the perceived absence of a

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immunity analysis. *Siegert*, 500 U.S. 226, 232. It would appear that even this debate, *see, e.g., DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995) (collecting cases), has now been put to rest as a result of the Court's more recent applications of that guidance such as in *County of Sacramento v. Lewis*, 523 U.S. 833, 841-42 n.5 (1998) and *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

state supreme court ruling squarely on point, the Court of Appeals acted precisely in accordance with the rule this Court explained in *West:*

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts.
>
> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.
>
> . . . We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may

> think that the state Supreme Court may establish a different rule in some future litigation.

West v. American Telephone & Tel. Co., 311 U.S. 223, 236-238 (citations omitted), *quoted with approval in, Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 629-630 (1988) (concluding that "we are not at liberty to depart from the state appellate court's resolution of these issues of state law.") The Petition cites no court that has criticized or questioned the obvious soundness of this approach or suggested that it should be abandoned, nor does research reveal any.

Even if the underlying issue, the legal sufficiency of a state tort law claim without constitutional or other federal ramifications, were not far outside the appropriate sphere of Supreme Court review on certiorari, it should be clear that there was nothing unsound about the Court of Appeals' conclusion. The Court of Appeals squarely applied a decision directly on point from the Pennsylvania Superior Court, *GMH Assoc., Inc. v. Prudential Realty Group, CB*, 752 A.2d 889, 905 (Pa. Super. Ct. 2000), a decision which itself logically followed from prior cases addressing the same basic flaw at earlier procedural stages. *See, e.g., Rutherfoord v. Presbyterian-University Hospital*, 417 Pa. Super. 316, 334, 612 A.2d 500, 509 (1992) (once court concluded that defendants did not act unlawfully in terminating plaintiff, claim of civil conspiracy must also fail); *Nix v. Temple University*, 408 Pa. Super. 369, 380, 596 A.2d 1132, 1137 (1991) (no cause of action for civil conspiracy where underlying claim of tortious interference with employment contract was not viable); *Rosen v. Tesoro Petroleum Corp.*, 399 Pa. Super. 226, 238, 582 A.2d 27, 33 (1990) (claim for civil conspiracy must fail, due to the absence of a valid claim for the underlying

tortious acts of malicious prosecution or abuse of process), *appeal denied*, 527 Pa. 636, 592 A.2d 1303 (1991); *Pelagatti v. Cohen*, 370 Pa. Super. 422, 436, 536 A.2d 1337, 1344 (1987) (rejecting the argument that a civil conspiracy to commit illegal acts is actionable in and of itself), *appeal denied*, 519 Pa. 667, 548 A.2d 256 (1988); *Raneri v. DePolo*, 65 Pa.Cmwlth. 183, 187, 441 A.2d 1373, 1376 (1982) (complaint's failure to sufficiently allege underlying claims for defamation and interference with business relations also was fatal to conspiracy count); *Rose v. Wissinger*, 294 Pa. Super. 265, 276, 439 A.2d 1193, 1199 (1982) (where complaint fails to set forth sufficient claim for defamation or outrageous conduct causing emotional distress, there could be no conspiracy to commit those acts).

Moreover, the basic principle reflected in the foregoing cases by Pennsylvania's intermediate appellate courts, and applied in this case by the Court of Appeals, has existed in the Pennsylvania Supreme Court's own jurisprudence for nearly a century. In affirming the nonsuit of a claim for fraud and conspiracy to defraud, the state supreme court adopted the conclusions that "the significance of a conspiracy is that it gives the person injured a remedy against parties not otherwise connected with the wrong" and that "a conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action, – the damage, not the conspiracy, being the gist of the action." *Strunk v. Owen*, 199 Pa. 73, 48 A. 888 (1901) (per curiam).

CONCLUSION

For all of the foregoing reasons, it should be plain both that the Petition sets forth no basis for concluding that the Court of Appeals' decision was incorrectly decided, and that it does not present an issue that warrants resolution or elaboration by this Honorable Court. Accordingly, the Petition should be denied.

Respectfully submitted,

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